GOOI LOO SENG

v.

PUBLIC PROSECUTOR

SUPREME COURT, JOHOR BAHRU
DATO' SERI ABDUL HAMID BIN HJ. OMAR LP, DATO' EDGAR JOSEPH JR. SCJ, DATUK WIRA WAN YAHYA BIN PAWAN TEH SCJ
[CRIMINAL APPEAL NO. 05-155-91]
19 APRIL 1993

CRIMINAL LAW & PROCEDURE: Charge under s. 39B Dangerous Drugs Act 1952 - Appeal against conviction and sentence - Whether trial Judge directed himself correctly - Whether there was non-direction amounting to misdirection which resulted in a miscarriage of justice.

The appeallant was charged with trafficking in dangerous drugs, to wit heroin, and at the conclusion of the trial he was duly convicted and sentenced to death. The evidence of the prosecution witnesses was that the heroin was recovered from the appellant's bedroom. The prosecution witnesses further stated that it was the appellant himself who recovered the heroin from a cupboard in the bedroom which evidence was at variance with the contents of a contemporary document, the Search List, which stated that the heroin was recovered by the police officer in charge of the operation.

The appellant's defence was that he had no knowledge of the heroin and denied that it was he who recovered the heroin from the cupboard. He also testified that he did not have exclusive access to the bedroom as his girlfriend and some of her friends she used to invite to play cards also had access thereto. The learned trial Judge accepted the evidence of the prosecution witnesses and rejected the crucial part of the defence case that the heroin was concealed in his bedroom without his knowledge.

Held:

[1] The trial Judge in accepting, at full face value, the testimony of the appellant's girlfriend that although she had a set of keys to the bedroom she never ever entered it when the appellant was not in, did not seem to have recognised that the girlfriend might have had every possible motive to suppress the truth and to lie bearing in mind that she was an obvious suspect.

[2] The trial Judge had failed to recognise the significance of the contents of the Search List. The Search List was entirely consistent with the appellant's version of the events in the bedroom and flatly contradicted the prosecution witnesses' version.

[3] Had the trial Judge approached the prosecution case in the manner indicated, it could not confidently be said that he would or must inevitably have rejected the appellant's version that he had no knowledge of the presence of the heroin in the bedroom and that it could have been hidden there by others having access to the bedroom in his absence.

[4] The trial Judge was bound to, but did not, view the whole of the evidence objectively and from all angles, with the result that the appellant had lost the chance which was fairly open to him of being acquitted. This non-direction amounted to a misdirection and in the circumstances a miscarriage of justice may well have occurred.

[Appeal allowed. Conviction quashed. Appellant ordered to be acquitted and discharged].

[Bahasa Malaysia Transalation of Headnote]

UNDANG-UNDANG JENAYAH DAN PROSEDUR: Dipertuduh di bawah s. 39B Akta Dadah Berbahaya 1952 - Rayuan terhadap sabitan kesalahan dan hukuman - Sama ada Hakim perbicaraan mengarahkan diri beliau dengan betul - Sama ada terdapat ketidakarahan yang terjumlah kepada kesalaharahan dan hasilnya ialah salah laksana keadilan.

Perayu dipertuduh mengedar dadah berbahaya, iaitu heroin, dan di akhir perbicaraan beliau telah disabitkan kesalahan dan dihukum mati. Keterangan saksi pendakwa ialah bahawa heroin tersebut dijumpai di bilik tidur perayu. Seterusnya saksi pendakwa menyatakan bahawa perayu sendiri yang menjumpai heroin tersebut dari dalam sebuah almari di bilik tidur berkenaan dan keterangan ini adalah berbeza sekali dengan kandungan dokumen semasa, senarai carian, yang menyebutkan bahawa heroin tersebut ditemui oleh pegawai polis yang bertanggungjawab dalam operasi tersebut.

Pembelaan perayu ialah bahawa beliau tidak mempunyai sebarang pengetahuan mengenai

heroin tersebut dan menafikan bahawa beliaulah yang menemui heroin itu dari dalam almari berkenaan. Beliau juga memberi keterangan bahawa beliau tidak mempunyai akses ekslusif kepada bilik tidur tersebut memandangkan teman wanitanya dan beberapa rakan teman wanitanya yang pernah diundang oleh teman wanitanya untuk bermain terup juga mempunyai akses ke bilik tidur tersebut. Hakim perbicaraan yang bijaksana telah menerima keterangan saksi pendakwa dan menolak bahagian yang penting dalam pembelaan kes tersebut bahawa heroin berkenaan disembunyikan dalam bilik tidur perayu tanpa pengetahuannya.

Diputuskan:

[1] Hakim perbicaraan dalam menerima, pada lahiriahnya, akan testimoni teman wanita perayu bahawa walaupun teman wanita itu mempunyai satu set kunci kepada bilik tidur berkenaan, beliau tidak pernah masuk ke dalamnya apabila perayu tiada di rumah, nampaknya tidak terfikir bahawa teman wanita itu mungkin mempunyai sesuatu motif untuk melindingi kebenaran dan menipu dengan mengambilkira bahawa teman wanita itu merupakan orang yang disyaki dengan jelasnya.

[2] Hakim perbicaraan gagal mengambilkira kepentingan kandungan Senarai Carian. Senarai Carian tersebut pada keseluruhannya konsisten dengan versi perayu mengenai peristiwa dalam bilik tidur berkenaan dan langsung menyangkal versi saksi pendakwa.

[3] Sekiranya cara pendekatan Hakim perbicaraan terhadap kes pendakwaan ini adalah sebagaimana yang dinyatakan di atas, tidak boleh dengan yakinnya dikatakan bahawa beliau akan atau mesti tanpa boleh dielakkan lagi menolak versi perayu bahawa perayu tidak mempunyai sebarang pengetahuan mengenai kewujudan heroin dalam bilik tidur berkenaan dan bahawa heroin itu mungkin disembunyikan di situ oleh sesiapa sahaja yang mempunyai akses kepada bilik tidur tersebut apabila perayu tiada di situ.

[4] Hakim perbicaraan sepatutnya, tetapi tidak, melihat keseluruhan keterangan secara objektif dan dari segala sudut, di mana hasilnya ialah perayu telah kehilangan peluang yang terbuka kepadanya untuk dibebaskan. Ketidakarahan ini terjumlah kepada kesalaharahan dan dalam hal ini suatu salah laksana keadilan mungkin telah berlaku.

[Rayuan dibenarkan. Sabitan kesalahan dibatalkan. Perayu diperintah supaya dibebaskan dan dilepaskan].

Cases referred to:

R v. Bundy 5 Cr. App. R 270 ***(refd)***

Legislation referred to:

Dangerous Drugs Act 1952, ss. 37(d), (da)(i), 39B (1)(a), (2)

For the appellant - Teh Poh Teik; M/s. Teh Poh Teik & Co.

For the public prosecutor - Idris bin Harun, DPP

JUDGMENT

Edgar Joseph Jr. SCJ:

This appellant was prosecuted in the High Court at Johor Bahru, before Judicial Commissioner James Foong (as he then was) upon the following charge:

> That you, Gooi Loo Seng I.C. No. 4629774 (B) on 20 August 1986 at about 10.00 p.m. in a room in house No. 89, Jalan Baldu 2, Taman Sentosa, Johor Bahru, in the State of Johor, were found trafficking in a dangerous drug, to wit, heroin, having a net weight, in all, of 22.469 gm., on your own behalf, and that you have accordingly committed an offence under s. 39B(1)(a) of the Dangerous Drugs Act 1952, and punishable under s. 39B(2) of the same Act.

At the conclusion of the trial, he was convicted and sentenced to death and against that conviction he had appealed.

According to the evidence led by the prosecution, on 20 August 1986 at about 9.30 p.m., as a result of information received, Inspector Nordin Kadir (PW. 6) led two of his men, Detective Corporal Muda Mohd. (PW. 7) and Detective Constable Wahid (not called though identified), to a place near a public telephone booth, in Jalan Cokmar, Taman Sri Tebrau, Johore Bahru, and took up ambush position there. A short while later, a motor car bearing registration No. JAL 1207 pulled up nearby. The driver - a male Chinese - identified as the appellant, alighted and leaned against the car. It was at this point of time that Inspector Nordin and his men emerged and approached the appellant, identified themselves, and

proceeded to search his person and his car but recovered nothing incriminating.

On the request of Inspector Nordin, the appellant then led the police party to his place of abode, which was a bedroom he had rented and comprised in the ground floor of No. 89, Jalan Baldu, a double storey dwelling house. It was common ground that the appellant was not the only person who slept in this bedroom, for his girlfriend, a bar girl named Tan Ah Kwai (PW. 4), also did so, at least, about twice a week.

Upon entering the bedroom, Inspector Nordin found no one in and instructed Wahid to conduct a search of it. So, Wahid approached a plastic cupboard, but before he could proceed to search it, it was said that the appellant prevented him from doing so, and somewhat obligingly, himself recovered from the bottom of the plastic cupboard, in between some clothes, two newspaper packages, which he promptly handed over to Inspector Nordin, who, on opening the first package, found enclosed therein, 15 plastic packets containing a granular substance suspected to be heroin. Similarly, on opening the second package, Inspector Nordin found in it a plastic packet containing a granular substance suspected to be heroin. During the search he conducted, Wahid recovered from the top portion of the plastic cupboard three empty plastic packets and the appellant's passport and a sum of RM1,039 in cash. Inspector Nordin then took possession of all the exhibits aforesaid, arrested the appellant, and brought him to the police station, where the exhibits were properly marked.

Subsequently, the suspected heroin was examined and analysed by the Government Chemist who confirmed Inspector Nordin's suspicions by certifying it was indeed heroin, a dangerous drug within the meaning of the Dangerous Drugs Act 1952 ("the Act") weighing in all 22.469 gms.

A second search of the same bedroom conducted by the police during the small hours of the morning of 21 August 1986, resulted in the recovery of a Dunhill briefcase containing RM5,950 in cash, the property of the appellant.

No women's clothing or personal effects were however recovered from the bedroom during either search.

Going back a little, we must interpolate to mention, that the version of the prosecution regarding the events during the initial search in the bedroom was glaringly at variance with the contents of a contemporary document, to wit, a Search List, prepared and signed by Inspector Nordin himself, at 10.00 p.m. on 28 August 1986, - in other words, immediately, after the seizure of the exhibits - on one important point - namely, who had found the suspected heroin? According to the Search List, it was Inspector Nordin who had found the suspected heroin. In other words, no mention was made in the Search List that it was the appellant who had himself recovered the two newspaper packages containing the heroin from the bottom of the plastic cupboard and then handed them to Inspector Nordin. Nor was Wahid called to give his own version of the events. These are points to which we shall be returning when we come to consider the grounds of decision of the trial Judge.

At the trial, there was also called by the prosecution the appellant's girlfriend, Tan Ah Kwai, who admitted that she held a set of keys to the bedroom, that she had used the bedroom as her own, that she shared the same bed there with the appellant, on the average for one or two nights a week, and that following the arrest of the appellant, she had gone to the police station and there taken delivery of the appellant's car. She was at pains to add that whenever she was in the bedroom, the appellant was around and that she had her own accommodation at a hostel provided by her employer. The trial Judge said that he **tended to believe** her story as she appeared to be a truthful and straightforward witness.

The landlord, Kam Lok Nga (PW. 3), was also called as a witness for the prosecution. He testified that when the appellant had approached him to rent the bedroom he was accompanied by Tan Ah Kwai, that the appellant had introduced her as his wife, that after it had been let to the appellant, she had slept in it, and that after the appellant's arrest she had removed all personal effects in it and also paid a month's rental.

At the close of the case for the prosecution the trial Judge found that the prosecution had successfully invoked the presumption under s. 37(d) of the Act, and so the appellant was deemed to be in possession of the heroin, and

as its weight exceeded 15 gms, he was by reason of the presumption under s. 37(da)(i), to be presumed, until the contrary was proved, to be a trafficker in the same. He accordingly ruled that the prosecution had established a *prima facie* case against the appellant which, if unrebutted, would warrant a conviction, and so called upon the appellant to enter upon his defence.

Upon his defence being called the appellant, elected to give evidence on oath.

He freely admitted the circumstances under which he was detained by the police at Jalan Cokma Satu, near a telephone booth and explained that he was then intending to make a telephone call to his girlfriend, Tan Ah Kwai, to enquire when she would be finishing work so that he could have supper with her.

Turning to the events in his bedroom, in particular, the search there conducted by Inspector Nordin and his men, he denied that it was he who recovered the heroin from the cupboard. He maintained that it was Nordin who had found the heroin in the cupboard, and he went on to deny all knowledge of the presence of the heroin in the bedroom.. He also testified that he did not have exclusive access to the bedroom as his girlfriend, Tan Ah Kwai, and some of her friends she used to invite to play cards also had access thereto. One such friend was a woman named Ling Ling who was identified in Court by Tan Ah Kwai under cross-examination as her colleague who worked at the same bar, though not called to testify.

The trial Judge thought it rather puzzling that the defence having caused Ling Ling to be identified did not then call her to testify, and went on to say, that as a result, he could not help but infer that the allegations of the appellant about Tan Ah Kwai inviting her friends like Ling Ling to the bedroom for gaming, were not true. This inference ought not to have been drawn by the trial Judge as the appellant was at liberty to call such evidence as he though fit. Be that as it may, we note that Tan Ah Kwai had first said under cross-examination that she had never brought her friends to the bedroom but, soon after her attention was drawn to Ling Ling, she resiled somewhat and said that she could not recall if she had brought friends to the bedroom during the absence of the appellant.

We note also that the trial Judge accepted at full face value the testimony of Tan Ah Kwai that although she had a set of keys to the bedroom she **never** ever entered it when the appellant was not in. In thus accepting the testimony of Tan Ah Kwai, the trial Judge does not seem to have recognised that Tan Ah Kwai might have had every possible motive to suppress the truth and to lie, if necessary, at the expense of the appellant, bearing in mind that she was an obvious suspect. In any event, we consider that Tan Ah Kwai's testimony on this point was, to put it mildly, an improbable story. The fact of the matter was that she could have had access to the bedroom, and if necessary, with her friends, without attracting the attention of the appellant. The trial Judge however adopted a Nelsonian approach to Tan Ah Kwai's testimony, and as a result, rejected the crucial part of the defence case which was that the heroin was concealed in his bedroom without his knowledge.

But, of equal importance, was the point that the trial Judge failed to recognise the significance of the contents of the Search List; in particular, as we have already remarked, that it told a materially different story to that deposed to by Inspector Nordin regarding the circumstances under which the heroin was recovered, and as a result, he inferred that the appellant had custody and control of the heroin and knew of its nature.

The Search List, prepared by Inspector Nordin himself, virtually on the spot, was entirely consistent with the appellant's version that it was not he but Inspector Nordin who had found the heroin at the bottom of the plastic cupboard, and so flatly contradicted Inspector Nordin's version that it was the appellant who had prevented Wahid from conducting a search of the plastic cupboard, and had then oblingingly recovered the heroin from the bottom of the cupboard and handed it over to Inspector Nordin. And Wahid, though available, was not called by the prosecution.

Had the trial Judge approached the prosecution case in the manner we have indicated, we cannot confidently say that he would or must inevitably have rejected the appellant's version that he had no knowledge of the presence of the heroin in the bedroom and that it could have been hidden there by others having access to the bedroom in his absence.

We need hardly add, that even if the appellant had known of the presence of the heroin in his bedroom, that by itself would not have been sufficient to establish that he was in possession or in control of it given the fact that others too, and certainly his girlfriend Tan Ah Kwai, had access to the bedroom and could have concealed the heroin there. At the end of the day, this was a case of the proverbial cap which might have fitted not just the head of the appellant but that of others as well.

Clearly, therefore, the trial Judge, was bound to, but did not view the whole of the evidence objectively and from all angles, with the result that the appellant had lost the chance which was fairly open to him of being acquitted. On this point, we consider that non-direction amounts to a misdirection, for, in the words of Pickford J. in *R v. Bundy* 5 Cr. App. R 270:

> the trial was not satisfactory, and the case was not put to the jury in a way to ensure their due appreciation of the value of the evidence.

We must treat the failure of a trial Judge sitting alone, to direct himself correctly in the same way as a failure to direct a jury correctly. In these circumstances, a miscarriage of justice may well have occurred.

Accordingly, we had no alternative but to allow the appeal, quash the conviction and, to substitute in lieu thereof, an order of acquittal and discharge.